

2 Pillsbury Street Realty Corporation
v.
Department of Revenue Administration
Docket No.: 23987-09BP

2 Pillsbury Street Realty Corporation
v.
Department of Revenue Administration
Docket No.: 23989-09TR

ORDER

On April 28, 2010, the board, pursuant to its RSA 21-J:28-b, IV authority, held a consolidated hearing on these appeals by the “Taxpayer” of business profit tax and real estate transfer tax liability determinations by the department of revenue administration (“DRA”). One day prior to this scheduled hearing, on April 27, 2010, the Taxpayer filed a “Motion to Continue Hearing” (the “Continuance Motion”) and the DRA filed a “Motion to Require Bond” (the “Bond Motion”). The board held an extensive hearing focused on these two motions and then ruled from the bench, granting both motions subject to the conditions stated below.

The board will first provide a very brief summary as background for the findings reflected in this Order, which revolve around the question of whether the parties, through their

respective attorneys, reached a settlement.¹ The Continuance Motion is premised on the Taxpayer's argument that there was a "meeting of the minds" regarding settlement of the Taxpayer's liability for the taxes under appeal (the "amount owed") to the DRA (\$96,197.39), making a substantive hearing on the merits of the appeals unnecessary, and, to a lesser extent, the unavailability of a key witness (Charles A. Snell, "the former President" of the Taxpayer) if the board chose to proceed to the merits. Mr. Snell now lives in Florida and was advised by the Taxpayer's attorney (Mark H. Puffer, Esq.) that the appeals "had been settled." (See Motion to Continue Hearing, ¶¶ 3, 4 and 8; and Taxpayer Exhibit No. 1.)

The DRA, on the other hand, opposed the Continuance Motion based on arguments by its attorney (John F. Hayes, Esq., Revenue Counsel) that no meeting of the minds occurred.² In addition, the DRA noted the April 28, 2010 hearing was scheduled months in advance (in August, 2009) and Mr. Snell should have made plans to attend it (well before the settlement

¹ Cf. the board's discussion of settlement agreements in a recent Decision, Infinity Sherwood Properties, Ltd. Prt. v. Tilton, BTLA Docket No. 24298-08PT (April 19, 2010), at pp. 2-3:

The board has the inherent authority to determine whether this . . . appeal has been settled. See Appeal of Land Acquisition, 145 N.H. 492, 494 (2000). Ideally, settlements should be embodied or confirmed in one clear document, signed by each party or its representative, and stating all material terms, but an "oral settlement agreement" can also be valid, id. at 496, even if there is no writing signed by the party to be bound by the settlement. The board's authority to act includes the ability to "mark[] the case as 'settled' on its docket" when it finds a settlement has been reached. Id. at 495. . . .

Whether oral or written, "[s]ettlement agreements are contractual in nature" and require, in addition to offer, acceptance and consideration, a "meeting of the minds" which "occurs when there is mutual assent to the essential terms of the contract. (Citations omitted.)" See, e.g., Poland v. Twomey, 156 N.H. 412, 414 (2007). Deciding whether a settlement was entered into and making findings regarding its terms are mixed questions of law and fact and a tribunal's determination will not be overturned unless it is clearly erroneous. Id.

² More specifically, the DRA argued the Taxpayer had conditioned the agreed-upon liability amount with a further statement that part of it would be paid by Mr. Snell, but DRA expected full rather than partial payment as a result of the settlement and the DRA stated it is also unclear who the correct "party" or parties to the settlement were (the Taxpayer and/or a successor company, for example); consequently, according to the DRA, there was no meeting of the minds, simply a counter-offer to the DRA's initial settlement proposal, which was rejected by Attorney Hayes when he returned from vacation and reviewed it. (Cf. DRA Exhibits A and B.) The DRA also cited the board's rules regarding "Settlements" (Tax 210.09).

negotiations took place). The Taxpayer did not file the Continuance Motion until one day before the April 28, 2010 hearing. Further, the DRA has concerns regarding the “collection” of the sums owed and the impact of further delays stemming from a continuance of the substantive hearing, leading the DRA to request a bond be provided by the Taxpayer. (See RSA 21-J:28-b, V, quoted in Bond Motion, ¶11.)

After reviewing the evidence and arguments presented, including the emails between the parties’ attorneys, as well as the collection concerns expressed by the DRA, the board made the following findings and rulings from the bench. The board finds there was a meeting of the minds regarding a settlement of the Taxpayer’s total combined tax liability (\$96,197.39) and that it was reasonable for the DRA to have an expectation that it would collect this amount through the settlement. The board will therefore hold these appeals in abeyance and orders the Taxpayer to provide a bond for this amount within thirty (30) days of the date of this Order and supply documentation to that effect to both the DRA and the board. Such a bond, as provided in RSA 21-J:28-b, V, is intended to insure payment of the Taxpayer’s total tax liability of \$96,197.39. If no such bond is provided within this time period, the board will withdraw this conditional finding and conclude there was no meeting of the minds regarding a settlement and therefore proceed to schedule a hearing on the merits of these appeals.

Any appeal of this Order requires compliance with the rehearing and timeline provisions contained in RSA ch. 541 and Tax 201.37.

#23987-09BP, 2 Pillsbury Street Realty Corporation v. DRA

#23989-09TR, 2 Pillsbury Street Realty Corporation v. DRA

Page 4 of 4

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Mark H. Puffer, Esq., Preti, Flaherty, Beliveau & Pachios, PLLP, 57 North Main Street, PO Box 1318, Concord, NH 03302-1318, counsel for the Taxpayer; and John F. Hayes, Esq., Revenue Counsel, DRA, 109 Pleasant Street, Concord, NH 03301.

Date: May 4, 2010

Anne M. Stelmach, Clerk